BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF

Karachi Stock Exchange, Lahore Stock Exchange and Islamabad Stock Exchange

(File No. 1/Dir(Inv) KSE/CCP/08)

Date of hearing:	14th January 2009
Present:	Dr. Joseph Wilson Member
Present for Karachi Stock Exchange:	Mr. Kamal Azfar, Advocate Mr. Haider Waheed, Advocate Mr. Rafique Umer, Company Secretary
Present for Lahore Stock Exchange:	Mr. Salman Raja, Advocate Mr. Waqqas Ahmad Mir, Advocate
Present for Islamabad Stock Exchange:	Mr. Aftab Chudhry, Managing Director Mr. Waris Niazi, Deputy Secretary

ORDER

1. The Competition Commission of Pakistan (hereinafter the "Commission") took *suo moto* notice of Circulars/Notices issued by Karachi Stock Exchange (hereinafter "KSE"), Lahore Stock Exchange (hereinafter "LSE") and Islamabad Stock Exchange (hereinafter "ISE") for placing/fixing a price floor for securities. KSE notice KSE/N-501, dated 27th August 2008, addressed to all of its members conveyed the decision of KSE board to place a floor on the trading price of the securities based on the closing price of securities as on 27th August 2008 and was to take effect from 28th August 2008. Subsequently LSE and ISE both followed the price floor decision taken by KSE vide their Circulars/Notices No. 2042 & ISE/CIR/08/101, respectively issued on 28th August 2008. At issue in this case is whether placing of floor (or fixing of minimum price) on the trading price of listed securities by KSE, LSE, and ISE during trading sessions amounts to "fixing the purchase and selling price . . . of any goods or the provision of any service" thereby violating Section 4 of the Competition Ordinance, 2007 (hereinafter the "Ordinance"). I affirm.

I. Background

A. Undertakings

2. Karachi Stock Exchange (Guarantee) Limited was incorporated under the Indian Companies' Act VII of 1913 (as applicable to Pakistan) on 10th of March, 1949 as a company limited by guarantee, and is a registered stock exchange under the Securities and Exchange Commission Ordinance, 1969 (hereinafter "KSE"). KSE was established "to conduct, regulate and control the trade or business of buying, selling and dealings in shares, scrips, Participation Term Certificates, Modarba certificates, Stocks, Bonds, Debentures, Debenture stock, Government papers, Loans, and any other instruments and securities of like nature including but not limited to Special

National Fund Bonds, Bearer National Fund Bonds, Foreign Exchange Bearer Certificates and documents of similar nature issued by the Government of Pakistan or any agency authorised by the Government of Pakistan."[1] KSE is an Undertaking as defined in clause (p) of Section 2(1) of the Ordinance.

3. Lahore Stock Exchange (Guarantee) Limited was incorporated under the Companies Ordinance, 1984 (XLVII of 1984) in October 1970, and is also registered under the Securities and Exchange Ordinance, 1969. LSE is an Undertaking as defined in clause (p) of Section 2(1) of the Ordinance.

4. Islamabad Stock Exchange was incorporated under the Companies Ordinance, 1984 (XLVII of 1984) on October 25, 1989 and it became operational on August 10, 1992.[2] ISE is an Undertaking as defined in clause (p) of Section 2(1) of the Ordinance.

5. Generally, all the three Undertakings, to wit, KSE, LSE and ISE are responsible for conducting, regulating and controlling the trade or business of buying, selling and dealing in shares, scrips, stocks, bonds, debentures, and any other instruments issued by the Government of Pakistan or any institution authorized by them. They provide following markets for the purpose of trading in equities and derivatives:

   i. Regular Market
   ii. Odd Lot Market
   iii. IPO Market
   iv. Future Market (Deliverable and Cash Settled Futures)

   The Undertakings are self-regulatory bodies and have adopted regulations for listing of companies and also for the admission, conduct, expulsion and suspension of members and the mode and conditions under which the business by their members is carried out.[3]

[1] KSE, Memorandum of Association, art. IV (1).
[2] Object Clause III(1) of Memorandum of Association of Islamabad Stock Exchange
[3] Object Clause III of Memorandum of Association of KSE and LSE, and Object Clause III(4) of LSE.

6. A stock exchange provides trading facilities for stock brokers to trade stocks and other securities. Trading facility is traditionally a physical facility, but now with the advances in technology it could also be an electronic facility in which multiple participants have the ability to execute or trade agreements, contracts or transactions by accepting bids and offers made by other participants in the facility or system.[4] In addition, a stock exchange provides facilities for the issue and redemption of securities as well as other financial instruments and capital events including the payment of income and dividends.

7. Under the Securities and Exchange Ordinance 1969, a transaction on a stock exchange must be made between two members of the exchange.[5] Such a transaction must be done through as a stock broker, which is a regulated profession.[6] No person is allowed to act as a dealer in a security which is listed on a stock exchange outside of such stock exchange.[7] For securities which are not listed on any stock exchange, there is an "over-the-counter market," which is a decentralized market where market participants trade over the telephone, facsimile or electronic network instead of a physical trading floor. There is no central exchange or meeting place for this market.

B. ***Facts***

8. Feeling the repercussions of the global financial crisis, the securities market in Pakistan witnessed a downward trend starting from 28th March 2008, when

[4] http://www.traderslog.com/Trading-Facility.htm

[5] Section 8(1), Securities and Exchange Ordinance, 1969:

> 8. Restriction on dealing in securities: (1) No person shall transact any business in securities on any Stock Exchange unless he is a member thereof.

[6] Section 5(A), *Id.*

> 5A. Brokers or agents not to engage in business without registration: No person shall act as broker or agent to deal in the business of effecting transactions in securities unless he is registered with the [Securities and Exchange] Commission in such manner, on payment of such fees and charges and on such conditions as may be prescribed.

See also, Brokers and Agents Registration Rules, 2001; Notification No. S.R.O. 299(1)/2001, dated 10th May, 2001.

[7] See Section 8(3) of the Securities and Exchange Ordinance, 1969:

> 8 (3) No person shall act as a dealer in a security listed on a Stock Exchange outside such Stock Exchange.

KSE-100 index was at 15,268 points.[8] From April to June 2008, the KSE-100 index fell by 4500 points. On 23rd June 2008, the Securities and Exchange Commission of Pakistan (hereinafter the "SECP"), in consultation with brokers changed the circuit breakers from their -5 to +5 per cent range to a -1 to +10 per cent range, creating an asymmetric system of breakers: prices could go down only 1% but they could go up 10%. According to one financial analyst, soon after the circuit breakers were revised "investors started realising that a market could not artificially be given a direction and if trades had to occur, a 1% lower breaker would only delay the fall in prices. All too often, the circuit breaker was hit and trading stopped because buyers and sellers refused to transact at the price permitted on the screen. Circuit breakers converted price risk into liquidity risk. Average daily volumes fell to a 10-year low to around 20 million shares a day, from last year's [2007] daily average of 240 million shares. Brokers started feeling the consequences of the SECP decision as their volume driven income depleted."[9] On 11th July 2008, the range of circuit breakers were restored to their original range, *i.e.*, -5 to +5 per cent.

9. The market kept plunging, the KSE 100-Index came down to around 9000 points on 26th August, 2008, and the KSE Board held a meeting with various stakeholder the same evening. Next morning, that is, on 27th August 2008, the KSE Board held two meeting with its members, which were attended by 35 and 103 members of the KSE respectively. "The members showed disappointment at the failure of public institutions in supporting the Equity Market Opportunity Fund. <u>They also indicated being not in a position to further sustain the losses and handle the margin calls made by the Exchange as well as their lending bankers. The 100 out of 103 members urged the Board for</u>

[8] Letter by Mr. Adnan Afridi, Managing Director, KSE, dated 27 Aug. 2008, addressed to the Chairman, SECP, submitted by KSE along with its reply to Show Cause. [hereinafter "KSE Letter"]
[9] Junaid Khalid, *Karachi's Experiments with Circuit Breakers in 2008*, available at http://ajayshahblog.blogspot.com/2008/12/karachis-experiments-with-circuit.html

flooring the price level of securities based on the closing price of the market as of August 27, 2008." [10] (Emphasis added).

10. On 27th August 2007, KSE issued a notice, bearing reference number KSE/N-501, to all members conveying the decision of the KSE Board to place a floor on the trading price of the securities based on the closing price of securities as on 27th August 2008. The Notice is reproduced here below *in toto*.

> Member of the Exchange are hereby informed that the Board of Directors of the Karachi Stock Exchange, after holding extensive consultations with stakeholders (including its members, fund managers, other exchanges, etc.) held an emergent meeting today. The Board observed that the continuous sharp decline in share prices can have implications for the wider financial system.
>
> In view of the above, the Board, in terms of the powers described in the Regulations of the Exchange, decided to place a floor based on the closing prices of securities of Wednesday, August 27, 2008, both in the Ready and Futures Market, whereby the individual security prices will remain free to trade within the normal circuit breaker limits, but not below the floor-price level of August 27, 2008
>
> It was decided to introduce the above mechanism effective from August 28, 2008 till further notice.
>
> The Board will engage SECP, State Bank of Pakistan and the Ministry of Finance to develop medium term measures for achieving stability in the capital market. (Emphasis supplied).

11. On 27th August 2008, at 07:21 p.m., (after business hours and presumably after the release of Notice No. KSE/N-501 by KSE) Ms. Musarat Jabeen, Director – Stock Exchanges Policy and Regulations Wing of SECP, sent an email, addressed to Mian Shakeel Aslam, Managing Director, LSE, and to Mr. Aftab Ahmad Chaudree, Managing Director, ISE. The said email was placed on record by LSE, and its contents are reproduced here below:

> Sub: Prevalent Stock Market Situation
>
> Dear Sirs,
> In view of the present continuous declining trend of the stock markets and consequent possibility of systematic risk resulting in disruption of timely and smooth settlement of trades, the Karachi Stock Market has proposed the following:
>
> 1. Freezing/flooring of market at 9,144.93 (KSE 100 Index level);
> 2. Market closure for a definite/indefinite time period and/or
> 3. Market continuation

[10] KSE Letter, *supra* note 8.

You are requested to furnish your views on the above KSE proposal in light of the existing stock market situation. Additionally, please confirm us your respective stock exchange position vis-à-vis risk management i.e., margin collection from members, protection of clearinghouse, etc.

Yours truly,

Musarat Jabeen

12. On 27th August 2008 at 9:10 p.m., Mian Shakeel Aslam, of LSE replied to the email of Ms. Musarat Jabeen. The contents of Mian Aslam's email are reproduced here below:

Dear Musarat

As discussed I have discussed the matter with board directors/members. Our general view on this is that interfering directly with the market mechanism can have negative repercussion for the market and confidence of investors, especially foreign investors.

We are of the view that certain other measures should be taken to help support the current volatile situation. Such measures should include amongst other things the following:

1. Stabilization/support fund to inject funding in to the market
2. Abolishing/reducing CVT
3. Making a requirement for listed companies to distribute a minimum of 40% of its profits as dividend (we believe that a similar measure was taken back 2002 or so?)

We feel that the above measures will help support the market longer term as opposed to short term measures that may have longer term consequences.

Further we would like to point out that at this point the clearing house of the LSE is fully under control through the adoption of the required risk management procedures/rules and as a result required margins are in tact.

However this said, if the KSE does decide to freeze or close the market then the LSE will follow the same in order to avoid technical/procedural problems and avoid any distortion of the market and hence maintain uniformity.

Further we are of the view that of the two proposed option, if these are to be adopted, then it would be better to freeze the market than close it and also freezing the market should not be for a day or two but for more of a sustained period of time.

Should you require further info on this then please let me know?

Regards

Shakeel

13. Interestingly, Mian Aslam had a discussion with LSE Board Directors and Members, and formed an important decision of placing the floor "for more of a sustained period of time" in less than two hours time, and communicated it back the director of the SECP.

14. On 28th August 2008, LSE issued Notice No. 2042 setting the price floor. The contents of the Notice are reproduced here below:

NOTICE FOR ALL MEMBERS

> Pursuant to the development in the Karachi Stock Exchange and in the interest of appropriate pricing, the Lahore Stock Exchange (G) Limited is also **placing a floor based on the closing prices on Wednesday, 27th August 2008 of securities**, both in the Ready and Future Market, whereby the individual security prices will remain free to trade within the normal circuit breaker limits, but **not below the floor price level** of 27th August 2008. This mechanism is effective 28th August 2008 till further notice.
>
> The SECP and other regulators and authorities will be engaged for the further betterment of the situation. (Emphasis in original).

15. The floor placed by LSE was applicable to all the securities listed on LSE and not just on those which were commonly listed on both the KSE and LSE; thus, enlarging the number of securities whose prices was originally frozen by the decision of KSE Board.

16. On 28th August 2008, ISE also placed floor on the closing price of securities of 27th August 2008, through its Circular No. ISE/CIR/08/101, essentially reproducing the Notice of KSE, and then adding a line documenting the rationale that "in order to maintain harmony of trade practices, the ISE shall also follow the suit." Placing the floor by ISE on the trading prices of all the securities listed at ISE also had the effect of enlarging the number of securities whose prices was originally frozen by the decision of KSE Board.

17. The KSE Notice number KSE/N-501 only affected the securities which were listed on the Karachi Stock Exchange by 27th August 2008. It did not apply to those securities which were listed after 27th August 2008. In order to make the "Floor Rule" applicable to all securities listed at the Exchange, KSE issued

another notice on 1st September 2008 bearing reference number KSE/N-5169. The contents of the Notice dated 1st September 2008 are reproduced below:

> NOTICE FOR ALL MEMBERS
> Placing a Floor based on closing prices of the Securities
>
> Further to our Notice No. KSE/N-5061, dated August 27, 2008, on the subject, wherein the Board of Directors of the Karachi Stock Exchange had decided to place a floor based on the closing prices of securities of Wednesday, August 27, 2008 across the board.
>
> However, subsequent to August 27, 2008 certain newly listed securities, started to trade for the first time. In order to bring the application of the "Floor Rule" at par for all the trading securities it has been decided to bring those newly listed securities also within the ambit of this rule.
>
> Therefore, Members of the Exchange are hereby informed that all **subsequently new listed securities** will also be subject to the said floor rule and accordingly, a floor shall be placed [till further notice] on all such securities based on their closing prices of the 2nd day's trading.
>
> **Moreover**, Companies which are subject to "**Buy Back Schemes**" shall continue trading at an **agreed price** duly notified by the Exchange for the purpose, consequently these securities shall be exempted from the said floor-rule.
>
> Members may please note the above.
> (Emphasis in original)

18. The decision to place floor on all securities listed after 27th August 2008 "based on their closing prices of the 2nd day's trading" put such securities at a competitive disadvantage vis-à-vis securities listed for sometime at the Exchange, as the former securities only get one day for discovery of their price. The other two exchanges, i.e., LSE and ISE, however did not make the floor rule applicable on securities listed on their respective stock exchange after 27th August 2008.

19. The Commission took notice of the Undertakings decision to place a floor on the trading price of all listed securities and initiated an inquiry under section 37 of the Ordinance. On 2nd September 2008, the Commission wrote a letter to KSE wherein the Commission asked KSE to give rationale for placing price floor. The Commission received a reply by KSE dated 06 September 2008,

sent through its counsel. The said letter raised technical objections and avoided to give any meaningful information to the Commission. The Commission, therefore, sent another letter on 15th September 2008 requiring once again the rationale for placing the price floor. A reply from KSE was received on September 29th 2008.

20. The Commission also sought comments from the Securities and Exchange Commission of Pakistan (hereinafter referred to as the "SECP") as a regulator of the securities market *vide* letter dated 15 October 2008. SECP, however, choose not to comment or reply to the letter of the Commission.

21. The Commission, on 27th November 2008, sent letters to LSE and ISE, inviting their point of view for the rationale behind the imposition of price floor on their respective exchanges. LSE responded with a letter dated 28th November 2008, and ISE submitted its views *vide* letter dated 1st December 2008.

22. The Inquiry Officer completed her Inquiry Report on 3rd December 2008, which concluded that the rationale given by all of three Undertakings *i.e.*, KSE, LSE and ISE is unsatisfactory to justify the setting/fixing of a minimum price at which securities can be traded, hence, the impugned arrangement *prima facie* violates Section 4(1), in particular section 4(2)(a) of the Ordinance.

23. Based on the recommendations made in the Inquiry Report, the Commission initiated proceedings under section 30 of the Ordinance and Show Cause Notices were issued to the Undertakings on 4th December, 2008. A hearing was scheduled for 8th January 2009, which was rescheduled on the request of KSE for 14th January 2009.

24. On 11th December 2008, the SECP issued a Directive, SMD/SE/2(20) 2008, addressed to the Managing Directors to all the three Undertakings to remove

the floor on 15th December 2008. The contents of the Directive are reproduced here below:

> **Directive under the Securities & Exchange Commission of Pakistan Act, 1997 (the "1997 Act")**
>
> Whereas, the Board of Directors of Karachi Stock Exchange, decided to place a floor on closing prices of securities effective vide notice No. KSE/N-5061 dated August 27, 2008;
>
> Whereas the Lahore Stock Exchange decided vide notice No. 2042 dated August 28, 2008 to place a floor on the closing prices of securities as on August 27, 2008;
>
> Whereas the Islamabad Stock Exchange decided vide notice No. ISE/CIR/08/101 dated August 28, 2008 to place a floor on the closing prices of securities as on August 27, 2008;
>
> Whereas the continuing restriction on the trade prices of the securities has adversely affected the ability of the market participants to manage their respective investments;
>
> Whereas it is in the public interest to allow the securities markets to function without any hindrance in order to maintain the confidence of the investors;
>
> Now therefore, I am directed to communicate that the Securities and Commission of Pakistan (**"**the Commission**"**) in exercise of its powers under section 40B read with paragraph (a), (b) and (c) of sub-section (4) of section 20; and paragraph (b) and (g) of sub-section (6) of section 20 of the 1997 Act, hereby directs all three stock exchanges to remove the floor placed on closing prices of securities in terms of the aforementioned **decisions of the stock exchanges**, and to ensure that the securities market functions in the ordinary course without any restrictions, effective as of December 15, 2008.
>
> It is hereby further directed that for a period of ninety days commencing December 11, 2008, the stock exchanges and their respective Boards of Directors shall not take any action which will interfere with the normal functioning of the stock exchanges and trading of securities, including but not restricted to the closure of the market or placing any restriction on the trade prices of securities, without consultation with and prior written approval from the Commission. (Emphasis added).

C. Submissions by KSE

25. In reply to the Show Cause, KSE made written submissions dated 26 December 2008. The submissions are summarized as follows:

Preliminary Legal Objections

a. KSE is regulated by the SECP, and the SECP had given a tacit approval to the KSE's action of placing a floor on the 27th August 2008 and KSE had all times complied with SECP directive including the one dated 11-12-08 asking from the KSE to remove the pricing floor.[11]

b. The said Ordinance is ultra vires the Constitution of Pakistan being beyond legislative competence of the Federation. Article 142 of the Constitution deals with the legislative lists. The Federal Government may only make laws with respect to matters listed on the Federal Legislative list or the concurrent legislative list. . . .In the instant case the Competition Ordinance related subject matter does not fall in the Federal or con-current legislative list and is therefore beyond the legislative competence of the Federation and therefore *ultra vires* the Constitution.[12]

c. The instant proceedings have been initiated without fulfilling the prerequisites contained in Section 37 of the Ordinance, which are two fold. First to conduct inquiry by the Commission (not any person/body) and thereafter to determine whether the proceedings under Section will be in the public interest. . . By relying on an alleged enquiry report which in itself is without jurisdiction and by illegally by-passing and ignoring determination of public interest by purported *suo moto* action, there has been precisely such a failure on the part of the Commission.[13]

Arguments on the Merits of the Case

d. The action to place the floor was taken pursuant to Regulations 8.8 of Regulations Governing Risk Management promulgated by the KSE in exercise of its powers conferred by section 34 of the SEC Ordinance 1969 with the prior approval of the SECP. That the decision to place a floor was a decision taken by the Karachi Stock Exchange as a frontline regulator and not as a business.[14]

e. The circumstances surrounding the KSE's decision to place a floor on August 27th 2008 were indeed emergent, exceptional and all but drastic and such decision made by KSE board was in the public interest.[15]

f. KSE also mentioned some measures of the same drastic nature taken in the international security markets of Russia, England and USA to stabilize the emergent situation of the market.[16]

[11] Para I of reply on behalf of KSE to Show Cause Notice [KSE Submissions]
[12] *Id*., para II.
[13] *Id*., para III.
[14] *Id*., para 1.
[15] *Id*., para 3.
[16] *Id*., para 5.

g. Neither undertaking has restricted competition in the market by disallowing market players from selling securities at a price of their choice. When all the participants/entrants are allowed the choice of purchase or sale and entry or exit subject to market rules and regulations then such is not an example of restrictive trade practice or lack of choice but is in fact an example of free trade within the parameters and restrictions of rules and regulations. … Furthermore, it may be seen that there are no barriers to entry or exit on any participants as a price floor applies to all parties across the board. … Furthermore it may be seen that trade also continued unabated off-market pursuant to SECP directions and the floor did not hinder such activity all.[17] (Emphasis added).

h. The concept of resale price maintenance has nothing to do with the answering respondent as the respondent is not the supplier (or seller) of securities to any person (whether the brokers trading on the Respondent's stock exchange or the brokers' customer). No question of any "resale" therefore arises in the present context.[18]

i. Floor price was not a result of an arrangement and or agreement between KSE, LSE and ISE as contemplated under section 4 of the Ordinance.[19] Placing of floor was not a result of any arrangement/agreement between the parties. Furthermore KSE is not an association of undertakings. Also there has not been a determination of the relevant market. In the above circumstances it is clear that section 4 can neither arise nor be addressed.[20]

j. Article IV (4)(d) of the Memorandum of Association of KSE authorizes it to make or adopt regulations relating to " fixing and declaring market rates and settlement rates and dates."[21]

D. ***Submissions by LSE***

26. In reply to the Show Cause, LSE made written submissions on 13th January 2009. The submissions are summarized as follows:

Constitutional Issues/Objections

a. The Competition Ordinance, 2007 is *ultra vires* the Constitution of Pakistan. In terms of Article 142 of the Constitution, the Federal Legislature does not have power to make law on competition as the

[17] *Id*., para 7.
[18] *Id*., paras 8& 9.
[19] *Id*., para 6.
[20] *Id*., paras 11 & 12.
[21] Argument presented at the hearing.

subject matter is not enumerated in either Federal or Concurrent Legislative List.[22]

b. The Ordinance bestows judicial powers of the State of Pakistan on the Competition Commission in violation of constitutional principle of separation of power. The members of the Commission are appointed by the Federal government and are not independent as required by Article 175(3) of the Constitution.[23]

c. The Ordinance is *ultra vires* the Constitution as it does not provide right of appeal before an independent judicial forum.[24]

d. The Ordinance in not [a] law anymore as it stood repealed on the 3rd February, 2008 after expiry of four months from the date of promulgation, i.e., 02.10.2007, in terms of Article 89(2)(a)(ii). It had never been re-issued or re-promulgated and is thus no longer an active law.[25]

Legal Issues

e. Section 4 of the Ordinance does not apply to LSE, as it has not entered into any "agreement." This section would apply in relation to a 'decision' if *an association of undertakings* was involved, and that LSE is not an 'association of undertakings.'[26]

f. Floor was placed by LSE to prevent panic selling through the platform provided by the LSE. If LSE had not imposed a "floor" the resultant exaggerated price fall would have created the danger of large scale default by the members of the LSE. The price discovery caused at the LSE in panic circumstances would have resulted in the erosion of the security value of the members of the KSE in compliance with the requirements of the CFS-Mk II framework.[27]

g. Since April 2008, the CFS financing for the trading of securities is routed through the National Clearing Company of Pakistan Limited ('NCCPL'). A fall in the share price affects the value of collateral deposited with the NCCPL. With a fall in share prices (at the LSE in the absence of a "floor"), a large number of members of the KSE and LSE would have seen the value of their collateral plummet. . . . It cannot be stressed enough that a crisis faced by only a few in the stock market can and does have a ripple

[22] Para 2 of reply on behalf of LSE to Show Cause Notice [LSE Submissions]
[23] *Id*., para 3
[24] *Id*., para 4.
[25] *Id*., para, 5.
[26] *Id*., paras 6 & 7.
[27] *Id*., para 8.

effect. The stability of the entire securities market in Pakistan was at stake once the KSE imposed the "floor."[28] (Emphasis added).

h. The actions of the LSE did not prevent, restrict or reduce competition in the relevant market in any way. The actions of LSE amounted to a mere suspension of a service for securities trading below a certain level. [29]

i. No competitor has been placed on weaker footing or been discriminated against. That by placing the floor, nothing prevented those seeking to enter or exit the relevant market from trading over the counter. In fact, a large number of broker to broker sales did take place during the entire period that the "floor" was in place.[30]

j. Imposition of floor by the LSE had a tacit support of the apex regulator of the securities market of Pakistan.[31]

E. ***Submissions by ISE***

27. ISE did not file any written submissions in reply to the Show Cause Notice. Its Company Secretary, Mr. Waris Niazi, was present at the hearing, and pleaded that ISE was unaware that its decision of placing floor violated Competition Ordinance, and apologized on behalf of the ISE and prayed for no or lenient penalty.

28. ISE in its letter dated 1st December 2008, bearing reference number ISE/CCP/08/9921, signed by Mr. Ahmad Noman, Secretary, made the following submissions:

a. That both ISE and LSE took this decision reluctantly after KSE has already implemented this measure. Both ISE and LSE being at unified trade platform thus decided to follow the suit. Had this mechanism not been adopted at ISE and LSE, the consistent fall in the prices of scrips at our trade platform would have created a great disparity and problems in the securities market of the country and we would have been completely out of line.

[28] *Id*., para 9.
[29] *Id*., para 10.
[30] *Id*., para 11.
[31] *Id*., para 12.

b. We have no doubts in our minds that the imposition of such a 'floor' greatly affects the choice, exit and entry determinants of a free market. However, it may also be added that the existence of well functioning markets is also critical to the investors to use the same for their investment objectives.

c. We may submit that although the decision to floor the market was initiated in good faith and in the larger interest of the market constituents, however, we admit that it has significantly impacted and shaken the confidence of the investors.

II. Discussion

A. Constitutional Objections

29. KSE and LSE raised objections as to the constitutionality of the Competition Ordinance, 2007 and as to the constitution of the Competition Commission of Pakistan, stated at paragraphs 25 (b), and 26 (a), (b) & (c) respectively.

30. To address the constitutional objections, I would refer to the judgment of the Full Bench of the Supreme Court of Pakistan in *Pir Sabir Shah v. Shad Muhammad Khan, Member Provincial Assembly N.W.F.P.*,[32] case, where the Court attended to the question whether a tribunal is competent to go into the question of *vires* of law under which it has been created. The Court noted that "there is distinction between a provision of a statute, which creates a Special Tribunal and a provision of such statute which specifies disputes/matters over which such a Special Tribunal will have jurisdiction. The Special Tribunal so created cannot decide that the provision under which it has been created is ultra vires the Constitution or that its appointment/constitution is defective or invalid." (emphasis added).

31. The *Pir Sabir Shah* Court discussed the case of *Akhtar Ali Parvez v. Altafur Rehman* (PLD 1963 (W.P.) Lahore 390) where a Full Bench of the erstwhile High Court of West Pakistan, headed by Manzur Qadir, C.J., dealt with the

[32] P.L.D 1995 Supreme Court 66.

question of jurisdiction of Special Tribunal in detail. The Court reproduced the following observation from the opinion of Manzur Qadir, CJ in *Akhtar Ali* :

> 15 An objection to the jurisdiction of a Tribunal may take one of the following general forms-
>
> (i) that the law under which that Tribunal is created is defective or invalid;
>
> (ii) that the Tribunal is not constituted or appointed validly under the law;
>
> (iii) that a party or parties is or are not amenable to the jurisdiction of the Tribunal; and
>
> (iv) that the subject matter is outside the field in which particular court is competent to act.
>
> It seems to me that when an objection is taken to the jurisdiction of the Tribunal, that objection must be treated as a preliminary objection and must be resolved before taking any further action. . . If a plea falling in the first or the second category is raised before a Special Tribunal, the answer of the Special Tribunal, which is a creature of the special law and is constituted or appointed under that law, must be simply and shortly that these matters are not for the Special Tribunal to decide. If a party needs a decision on those points, it will have to apply to the Courts of general jurisdiction in appropriate proceedings for that purpose. If, for example, a Rent Controller is told by a party before him that the West Pakistan Urban Rent Restriction Ordinance is invalid, he ought not, on that ground, adjourn the proceedings in that case to hear elaborate arguments on some future date. Were he to do so, the logical procedure for him would be, not only to adjourn that case but to adjourn all cases, and not only to adjourn cases but also to wind himself up as a Rent Controller till he has decided whether he is a Rent Controller or not a Rent Controller under a valid piece of Legislature. Similarly, if a Rent Controller is told that his own appointment is defective, it is not for him to postpone the hearing in that particular case because his appointment is challenged as defective; if it is defective, it is defective not only for the case in which the objection has been raised but also for all other cases. In respect of all such objections, the obvious and short answer of the Rent Controller must be that he, being a creature of the very laws or notifications which are being challenged before him, cannot suspend himself till he determines that matter; and that he must proceed so far as he is concerned on the assumption that his existence as a Rent Controller is of legal validity until a Court of competent jurisdiction decides or directs to the contrary.[33]

[33]*See also, Mehr Dad v. Settlement and Rehabilitation Commissions*, P.L.D. 1974 SC 193 (The Supreme Court of Pakistan held that "it is true that a Tribunal cannot go into the *vire* of the enactment under which it has been created); *Manager, Khewra Salt Mines v. The Mines Employees and Labour Union*, P.L.D. 1976 Lah. 601; *J.K. Manufacturers Ltd. v. The Sales Tax Officer, Kanpur*, AIR 1970 All. 362; s*ee also Chempak (pvt) Ltd. v Sindh Employees' Social Security Institution (Sessi)* 2003 PLC 380, Court held at page 385 " as observed by the Full Bench of Hon'able Supreme Court, comprising 12 judge, in *Federation of Pakistan v.*

32. The above quoted passages from *Pir Sabir Shah* and *Akhtar Ali Parvez* cases makes it clear that it is not for the Commission to address the objections raised as to the constitutionality of the Competition Ordinance, 2007 or the appointment of its members. The Commission must proceed on the assumption that its existence is legal and valid until a court of competent jurisdiction decides or directs to the contrary.

33. LSE also raised the objection at paragraph 26(d) above that the Ordinance is not a valid law any more as it stood repealed on 3rd February, 2008 after expiry of 4 months from the date of promulgation. In *Tika Iqbal Muhammad Khan and others v. General Pervez Musharaf*,[34] the Supreme Court of Pakistan has held that:

> Ordinances promulgated and legislative measures taken by the President, or as the case may be, by the Governor, which were in force at the time of, or during the period for which the Proclamation of Emergency, dated 3-11-2007 held the field, would continue to be in force by virtue of the Provisional Constitution Order, 2007 read with Art. 270AAA(3) of the Constitution, until altered, repealed or amended by the appropriate Legislature and there would be no question of expiry of these Ordinances in terms of Art.89(2), or as the case may be, under Art.128(2) of the Constitution.[35]

34. There has not been any enactment to date which has altered, repealed or amended Article 270AAA(3) of the Constitution of the Islamic Republic of Pakistan.

B. ***Application of Section 4***

35. Competition Ordinance was promulgated with the objects: (i) to provide for free competition in all spheres of commercial and economic activity; (ii) to enhance economic efficiency; and (iii) to protect consumers from

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Aitzaz Ahsan (PLD 1989 SC 61) it is a well-settled principle of Constitutional interpretation that until a law finally held to be *ultra vires* for any reason it should have its normal operation".

[34] P.L.D. 2008 SC 178.

[35] *Id*.

anticompetitive behaviour.[36] The term competition, while not defined in the Ordinance and rightfully so, refers to *business rivalry*, and the most obvious manifestations of rivalry are the number of players in any market and the lack of cooperation among them.[37] Rivalry, is it expected, will force the market players to price their goods or services at cost, and to take all other reasonable cost-reducing or product improving innovation measures. The process of rivalry thus allocates resources in a fashion that will "enhance economic efficiency." For competition to foster *in* a given market, the market needs to exhibit certain necessary conditions. That is, there are a large number of market players, products are homogeneous, everyone has perfect information about market conditions, there are no 'barriers to entry' which might prevent the emergence of new competition, and there are no 'barriers to exit, which might hinder market players wishing to leave the market. In sum, the determinants of a competitive market are: (i) absence of a dominant player; (ii) availability of choices; (iii) perfect information as to market conditions; (iv) easy entry; and (v) easy exit.[38] The primary objective of establishing a stock exchange is to bring a large number of buyers and sellers together, to buy and sell securities (homogenous products), have choices (as to type of securities and their price) and perfect information as to price of securities, and can purchase (enter) and sell (exit) securities at a price of their choice.

36. Section 4 of the Ordinance prohibits undertakings from entering into agreements or in the case of association of undertakings from making decisions, which have the object or effect of preventing, restricting or reducing competition within the relevant market. Section 4 in relevant part is reproduced here below:

> **4. Prohibited agreements**.-(1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings,

[36] Preamble, Competition Ordinance, 2007.
[37] See Areeda & Hovenkamp, FUNDAMENTALS OF ANTITRUST LAW, 3rd Edition , Aspen 2008 at p. 19-3. [hereinafter "Areeda & Hovenkamp"].
[38] *See* Einer Elhauge and Damien Geradin, GLOBAL COMPETITION LAW AND ECONOMICS, (Hart, 2007) at p. 1; Richard Whish, COMPETITION LAW, (Oxford Uni. Press, 5th ed., 2005) at p. 6.

> shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Ordinance.
>
> (2) Such agreements include, but are not limited to-
>
> (a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution or any goods or the provision of any service;
>
> .
>
> .
>
> (3) Any agreement entered into in contravention of the provision sub-section (1) shall be void.

37. Section 4(1) applies to agreements entered into by an undertaking[39] or to decisions made by an "association of undertakings" with respect to the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Ordinance.

38. Brokers are professionals and are regulated by the Securities and Exchange Commission of Pakistan.[40] Brokers provide professional services for the sale, purchase and trading in securities market.[41] The Undertakings, *i.e.*, KSE, LSE and ISE are associations of brokers,[42] and provide services to brokers for trading in securities. This Commission has held earlier that an association of professionals is an association of undertakings within the meaning of Section 4 of the Ordinance.[43] Thus, the separate decisions of KSE, LSE and ISE to

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[39] Section 2(1)(p) of the Ordinance defines "undertaking" to mean "any natural or legal person, governmental including a regulatory authority, body corporate, partnership, association; trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision of services and shall include an association of undertakings."

[40] *See* footnote 6, *supra*.

[41] *See* Para 07 above.

[42] *See*, *e.g.*, Memorandum & Article of Association, of KSE. Art 1, "the name of the Association is 'the Karachi Stock Exchange (Guarantee) Limited."

[43] *See*, *In the Matter of Institute of Chartered Accountants of Pakistan*, file No. 3/Sec-4/CCP/08. Order available at http://www.cc.gov.pk.

impose a floor or fix the minimum sale price of the securities, each fall within the purview of Section 4(1).

39. Furthermore, the term agreement is defined in Section 2(1)(b) to include "any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable." The decisions of the three Undertakings can also be classified as an arrangement between them and their respective members/brokers not to make offers for securities at a price less than what they have on the close of business day of 27th August 2008, and in the case of securities listed after 27th August 2008, the price they have on the second day of their trading. The latter rule was imposed by the KSE only. The letter by the Managing Director of KSE, makes this clear: that "the 100 out of 103 members urged the Board for flooring the price level of securities based on the closing price of the market as of August 27, 2008." [44] Additionally, the counsel for LSE argued that "the actions of LSE amounted to a mere suspension of a service for securities trading below a certain level."[45] The suspension of service by LSE (or KSE and ISE) was then pursuant to the arrangement which the Undertaking(s) had with its/their members. Thus, individual decisions by the Undertakings to place a floor on the trading prices of the securities also fall within the ambit of the term "agreement", which is prohibited by Section 4(1) of the Ordinance.

40. Dual characterization of a single infringement is permissible.[46] "It may be that, in a particular case, linguistically it is more natural to use one term than the other but legally nothing turns on the distinction: the important distinction is

[44] KSE Letter, *supra* note 8.
[45] LSE Submission, *supra* note 22 Para 10, *id*.
[46] *See, e.g*., *The Chicago Board of Trade* v. *United States* 246 U.S. 231 at 244 (1918) (describing the proposition as " a rule or agreement"). European Commission, Court of First Instance, and European Court of Justice, all have held joint classification or dual characterization of a single infringement (as an agreement and/or concerted practice). *See, e.g*.,, *Polypropylene* OJ [1986] L 230/1, [1988] 4 CMLR 347, para 87, substantially upheld on appeal Case T-7/89 *SA Hercules NV v Commission* [1991] ECR II-1711, [1992] 4 CMLR 84, upheld on appeal by the ECJ case C-51/92 P *Hercules Chemicals v Commission* [1999] ECR I-4235, [1999] 5 CMLR 976; *Soda-ash/Solvay, ICI* OJ [1991] L 152/1. [1994] 4 CMLR 645, para 55.

between collusive and non-collusive behaviour."[47] "That which we call a rose by any other name would smell as sweet."[48] Collusion would, however, smell anything but sweet.

41. Section 4(1) talks of relevant market, which term is defined under section 2 (1)(k) of the Ordinance.[49] In the instant case, the relevant product market comprises the listed securities in all the three stock exchanges of Pakistan, traded both in ready market and futures market, and the relevant geographical market is where the trading of such securities takes place, namely KSE, LSE and ISE. The respective market share of the three Undertakings at the time when the floor was placed and after it was removed is documented in the table below.[50]

	Number of Companies Listed	***Trading Volume in Rupees (Billions) as of 27 Aug. 08***	***Trading Volume in Rupees (Billions) as of 17 Dec 08***	***% age Decline in Trading Volume***	**% age Market Share of total Trading Volume (as on 17 Dec. 08)**
KSE	653	4.59	0.08	-98.3	94.79
LSE	519	0.31	0.0037	-98.8	4.74
ISE	248	0.04	0.0004	-99.0	0.47
Total	1420	4.94	0.0841	-98.3	100

42. The word 'object' as in Section 4 does not refer to "the subjective intention of the parties when entering into the agreements, but the objective meaning and purpose of the agreement considered in the economic context in which is to be

[47] Whish, *supra* note 38 at p. 94. citing cases quoted *id.*
[48] Shakespeare, Romeo and Juliet (II, ii, 1-2).
[49] "Relevant Market" means the market which shall be determined by the Commission with reference to a product market and a geographic market and product market comprises all those products or services which are regarded as interchangeable or substitutes by the consumer by reason of the products' characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas.
[50] Data collected from the following sources: LSE News Letter, Jan. 2009, available at http://www.lahorestock.com/NewsLetters/StockNewsLetteJan2009.pdf; Daily Market Report, SECP, available at http://secp.gov.pk/divisions/Portal_SMD/DailyMarketReport/2008/pdf/27_08_08.pdf.

applied."[51] Agreements that 'by their very nature' restrict competition are treated as having that object. [52] Under the E.C. jurisprudence, for example, "an agreement which has as its object the restriction of competition, it is unnecessary to prove that the agreement would have an anticompetitive effect in order to find an infringement of Article 81(1)."[53] Similarly, in the U.S., agreements which 'by their very nature' restrict competition are referred to as "naked" restraints, *i.e.*, naked in the sense that the restraint "does not accompany any significant integration of research and development, production or distribution,"[54] and they are condemned under *per se* rule, *i.e.*, without inquiring into their effects.

> The definition of naked restraint offered here speaks of the "objectively intended purpose" of increasing price or reducing output. This phrase is used to indicate two things; first, the objectively measured and likely consequence of the restraint is more important than the defendants' actual state of mind. The purpose of the rule identifying naked restraints is to enable relatively expeditious assessments of restraints, and as a general matter this is best accomplished by avoiding inquiries into the defendants' actual state of mind. Indeed, the defendants' state of mind is not even the determinative factor; a restraint might be naked even though it is well intended.[55]

43. Section 4(2) provides a non-exhaustive list of anticompetitive agreements. Section 4(2)(a) mentions agreement which "fix[ ] the purchase or selling price or impos[e] any other restrictive trading conditions with regard to the sale or distribution or any goods or the provision of any service." Price fixing agreement can be either horizontal or vertical. An agreement is said to be

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[51] Whish, *supra* note 38 at p. 110 citing the following cases: cases 29/83 and 30/83 *Compagnie Royale Asturiennne des Mines SA and Rheinzinc GmbH v Commission* [1984] ECR 1679, [1985] 1 CMLR 688 paras 25-26; Case C-277/87 *Sandoz Prodotti Farmaceutici v Commission* [1990] ECR I-45; case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, para 79.

[52] Valentine Korah, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE, (Oxford, Hart, 9th ed. 2007) at p. 74 citing J Faull and A Nikpay (eds), THE EC LAW OF COMPETITION (Oxford, OUP, 1st ed. 1999) at pp. 82-83.

[53] Whish, *supra* note 38 at 110, citing *Consten and Grundig v Commission*, Cases 56 and 58/64 [1966] ECR 299, p 342, [1966] CMLR 418, p 473, and *Vds v Commission*, case 45/85 [1987] ECR 299, p 342, [1966] CMLR 418, p 473.

[54] Areeda & Hovenkamp, *supra* note 37, at p. 20-11

[55] *Id.* at p. 19-29.

"horizontal" when (1) its participants are either actual or potential rivals at the time the agreement is made; and (2) the agreement eliminates some form of rivalry among them.[56] On the other hand, an agreement is said to be vertical when its participants are not direct competitors but have a vertical relation between them, *e.g.*, manufacturer and a distributor, wholesaler and a retailer, or a buyer and seller relationship.

44. Horizontal agreement eliminates competition among its participants, and is therefore scrutinized from a "competition" perspective. In *United States v. Socony-Vacuum Oil Co*., the Court held that agreements among rivals "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price" fall within the *per se* rule.[57] Under the *per se* rule, a violation is condemned without conducting an inquiry into the actual market conditions.[58]

45. Vertical price agreements may put restraint on the property rights of one of the parties to the agreement; however, the party putting the restraint on the property transferred always invariably owned the property in question. Vertical agreements are therefore scrutinized with the rights of property owners in perspective, in addition to competition concerns.[59] For example, in European Union, Article 4(a) of Regulation on block exemptions stipulates that exemption in not available to "vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of

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[56] *Id.*, at p. 19-4.

[57] *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150, 223 (1940).

[58] *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 at 692, 98 S.Ct. 1355 at 1365, (1978). The rationale for per se rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct. *See, e. g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 350-351 (1982); Under the usual logic of the per se rule, a restraint on trade that rarely serves any purposes other than to restrain competition is illegal without proof of market power or anticompetitive effect. *See also, Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958).

[59] For a discussion on the conflict between state regulation of competition and the rights of property owners, *see generally,* Rudolph J. Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285 (1989).

the parties, have as their object: (a) the restriction of the buyer's ability to determine its sale price. . ."[60] In the United States, the Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[61] was seized with issue of contracts between Dr. Miles and its dealers that established minimum resale prices. Troubled by Dr. Miles' attempt to deprive dealers of their "freedom of trade," the Court relied on a common law doctrine that prohibited restraints on alienation to strike down the contracts. [62]

> At common law, alienation refers to the voluntary transfer of the title of property by the owner to another. Thus, a restraint on alienability simply refers to some type of restriction on the salability or transferability of property. The common law, both in England and the United States, has traditionally favored the free alienation or transferability of property and looked askance at restrictions on alienation, particularly if privately imposed.[63]

46. The term "price fixing" is defined broadly in the case of horizontal agreements, than it is for buyer-reseller agreement between vertically related undertakings.[64] In horizontal agreements, the term price fixing includes not only fixing "explicit price" but also agreements to fix a "price element," which "may include such things as (a) terms of financing; (b) the 'grace period' between delivery and payment due date (which is simply a form of financing); (c) discounts, including acceptance of discount coupons; (d) rebates; (e) formula to be used for determining the price, such as relative value scales, and similar arrangements; and (f) a willingness to entertain competitive bids. In sum, 'price element' is defined broadly to include any term of sale that can be regarded as affecting the price that the customer must pay, or any mechanism such as a formula by which the price may be computed."[65] (Emphasis added).

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[60] EU: Regulation (EC) No 2790/1999 OJ 1999 L336/21.
[61] 220 U.S. 373 (1911).
[62] Denise L. Diaz & Robert A. Skitol, *Vertical Law Reform: Fertile Ground for a New Antitrust Modernization Commission*, 18-FALL Antitrust 60 at 61 (2003).
[63] C. Paul Rogers III, *Restraints on Alienation in Antitrust Law: A Past With No Future*, 49 SMU L. Rev. 497 (1996) , at 498 (footnotes omitted).
[64] Areeda & Hovenkamp, *supra* note 37, at 20-5.
[65] *Id.* at p. 20-68.

47. Thus, "the explicit 'price' of any good or service is a function not only of the nominal price, but also of the credit terms, applicable discounts, rebates, ***terms of delivery***, and the like."[66]

48. The decision of the Undertakings to set the price floor established horizontal price fixing at two levels: first, between members of each undertaking *qua* owners of securities, *i.e.*, as sellers and buyers of securities in their own right. Second, as brokers *qua* service providers, the decision to set the price floor for securities had the effect of fixing "price element" and therefore price for the provision of brokerage services to buyers, sellers, investors, and traders. Normally, horizontal agreement among competitors involves fixing of prices of "*their individual goods or services.*"[67] The peculiarity in this case is that the decisions of the Undertakings made the provision of brokerage services subject to the fixed minimum prices of their clients' goods (securities), or to put in other words, the ***terms of delivery of brokerage-services*** included that the securities (*i.e.*, goods belonging to others) can not be bought or sold below the prices fixed through the decisions of the Undertakings.

49. The horizontal agreement established at the first level, *i.e.*, between members of each undertaking *qua* owners of securities is an agreement which by its very nature has the object of restricting competition, or to use the U.S. vocabulary, is a 'naked' price fixing agreement and therefore liable to be condemned *per se, i.e.*, without any need to prove its anticompetitive effect.

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[66] *Id.*

[67] *Broadcast Music, Inc., v. Columbia Broadcasting System, Inc.,* 441 U.S. 1 at 9, 99 S.Ct. 1551 at 1556. Cf., *e. g., United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956) (manufacturer/wholesaler agreed with independent wholesalers on prices to be charged on products it manufactured); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (firms controlling a substantial part of an industry agreed to purchase "surplus" gasoline with the intent and necessary effect of increasing the price); *United States v. Trenton Potteries Co.,* 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927) (manufacturers and distributors of 82% of certain vitreous pottery fixtures agreed to sell at uniform prices).

50. Apart from looking at the *subjective intention* of the Undertakings *or objectively intended purpose* of the decisions, one might also look at the actual intention of the members of the KSE, which formed the basis of KSE's decision and latter became the trigger for the decisions of LSE and ISE. In this regard, letter by Mr. Adnan Afridi, Managing Director, KSE, dated 27 Aug. 2008, addressed to the Chairman, SECP is instructive. It reads in relevant part as follows:

> The members showed disappointment at the failure of public institutions in supporting the Equity Market Opportunity Fund. They also indicated being not in a position to further sustain the losses and handle the margin calls made by the Exchange as well as their lending bankers. The 100 out of 103 members urged the Board for flooring the price level of securities based on the closing price of the market as of August 27, 2008. [68] (Emphasis added).

51. The intention of the members to floor the price level of securities was thus to protect them from incurring further losses through the decrease in prices of the securities. The purpose would be to give an upward push to prices of the securities, so as to raise or stabilize them.[69] It is a received knowledge in any competition law regime that where the *actual intention* is to set a particular price or otherwise affect the market price, the decisions are liable to be condemned *per se.*[70] This fact alone is dispositive of the case, and further inquiry into the effects of the decisions on fixing the price of brokerage services is not warranted. However, in the interest of addressing all aspects of this case comprehensively, I will address that issue as well as defenses raised by the parties.

52. The horizontal agreement at the second level, *i.e*., the fixing of brokerage fee by fixing the price of securities is an unprecedented one, and therefore requires

[68] KSE Letter, *supra* note 8.
[69] *See, e.g., United States v. Socony-Vacuum Oil Co, supra* note 57, and the accompanying text.
[70] Areeda & Hovenkamp, *supra* note 37, at p. 20-8.

a rule of reason inquiry in the matter.[71] Neither the enquiry officer nor I could come across any reported case, from across the globe, where a stock exchange placed a floor on the trading prices of the securities. "The best-known example of an antitrust challenge to a market makers' rule is *the Chicago Board of Trade* v. *United States,*"[72] 246 U.S. 231 (1918). Brief facts and ruling in the case are summarized below:

> The U.S. government filed a suit to enjoin the Board of Trade's enforcement of a "call' rule, *i.e.*, a rule fixing the prices, for a time period between trading sessions, at which its members could make certain sales and purchases. The Board was the commercial centre in Chicago through which most of the trading in grain was done. The Board had approximately 1600 members, who included brokers, commission merchants, dealers, millers, maltsters, makers of corn products, and elevator owners. The standard forms of trading were: (a) Spot sales; (b) Future sales; and (c) Sales 'to arrive'.[73]
>
> On every business day sessions of the Board are held at which all bids and sales are publicly made. Spot sales and future sales are made at the regular sessions of the Board from 9:30 a. m. to 1:15 p. m., except on Saturdays, when the session closes at 12 m. Special sessions, termed the 'call,' are held immediately after the close of the regular session, at which sales 'to arrive' are made. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions, transactions are between members only; but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the sessions or after, and they may trade with nonmembers at any time except on the premises occupied by the Board.[74]
>
> In 1906 the Board adopted what is known as the 'call' rule. By it members were prohibited from purchasing or offering to purchase, during the period between the close of the call and the opening of the session on the next business day, any wheat, corn, oats or rye 'to arrive'

[71] Cf *United States v. Microsoft*, 253 F. 3d 34, 84 (D.C. Cir. 2001) (declining to condemn *per se* tying arrangements involving software products because there was "no close parallel in prior antitrust cases" and "simplistic application of *per se* tying rules carries a serious risk of harm").
[72] Areeda & Hovenkamp, *supra* note 37 at p. 21-49.
[73] *The Chicago Board of Trade* v. *United States* 246 U.S. 231 at 235 (1918). For a detailed discussion on Justice Brandeis opinion in the Chicago Board of Trade case, *see* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L. J. 775 at pp 815-820 (1965).
[74] *Id.*

> at a price other than the closing bid at the call. The call was over, with rare exceptions, by 2 o'clock. The change effected was this: Before the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit; after the adoption of the rule, the bids had to be fixed at the day's closing bid on the call until the opening of the next session.[75]
>
> If the parties wished to close a deal at a price either higher or lower that the previous session's close, they would have to wait and complete their transaction at the following call session.[76]

Justice Brandeis, whilst delivering the opinion of the Court, held:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[77]

In ascertaining the legality of the restraint imposed, the Court looked at: (i) the nature of the rule; (ii) the scope of the rule; and (iii) the effects of the rule.

> First. The nature of the rule: The restriction was upon the period of price-making. It required members to desist from further price-making after the close of the call until 9:30 a. m. the next business day; but there was no restriction upon the sending out of bids after close of the call.
>
> Second. The scope of the rule: It is restricted in operation to grain 'to arrive.' It applies only to a small part of the grain shipped from day to day to Chicago, and to an even smaller part of the day's sales; members were left free to purchase grain already in Chicago from any one at any price throughout the day. It applies only during a small part of the business day; members were left free to purchase during the sessions of the Board grain 'to arrive,' at any price, from members anywhere and from nonmembers anywhere except on the premises of the Board. It applied only to grain shipped to Chicago; members were left free to purchase at any price throughout the day from either members or non-members, grain 'to arrive' at any other market.

[75] *Id.* at 237.
[76] Areeda & Hovenkamp, *supra* note 37, at pp21-49 to 21-50.
[77] *Chicago*, *supra* note 73, at 238.

> Third. The effects of the rule: As it applies to only a small part of the grain shipped to Chicago and to that only during a part of the business day and does not apply at all to grain shipped to other markets, the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago. But within the narrow limits of its operation the rule helped to improve market conditions thus:
>
> (a) It created a public market for grain 'to arrive.' Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.
>
> (b) It brought into the regular market hours of the Board sessions, more of the trading in grain 'to arrive.'
>
> (c) It brought buyers and sellers into more direct relations; because on the call they gathered together for a free and open interchange of bids and offers.
>
> (d) It distributed the business in grain 'to arrive' among a far larger number of Chicago receivers and commission merchants than had been the case there before.
> .
>
> (f) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers.[78]

The Court upheld the "call" rule.

53. The *Chicago* decision is relevant to the case at hand and instructive insofar as it gives a template for ascertaining the legality, or for conducting the rule of reason inquiry, concerning a "regulation of trading on an organized exchange."[79] I will proceed to ascertain the legality of the decisions by the Undertakings by employing the three-prong test developed by Justice Brandeis in *Chicago*, *i.e.*, (i) the nature of the decision; (ii) the scope of the decision; and (iii) the effects of the decision.

[78] *Id.* at pp 239- 240.
[79] Bork, *supra* note 73, at 782. (the [*Chicago*] case is treated as precedent only for the legality of a minor regulation of trading on an organized exchange).

54. First, the nature of the decision. The decision of the Undertakings set the minimum price of all listed securities in Pakistan, for and during trading sessions from August 28th to 15th December, 2008 (109 calendar days). It prohibited the members of the Undertakings from making offers for the purchase of securities during trading sessions which are less than the prices of the securities as on 27th August, 2008, or in the case of securities listed on KSE after 27th August 2008, the prices they have on the 2nd day of their trading. The decision set the price rather than restricting the "period of price-making."

55. Second, the scope of the decision. The decision of the Undertakings was broad in operation, *i.e.*, that it applies to all listed securities in the Ready and Futures Market. The initial decision by KSE followed by LSE and ISE enlarged the scope of the decision from securities listed only at KSE to those listed at LSE and ISE, thereby extending the scope to all listed securities throughout Pakistan.

56. Third, the effects of the decision. As the decision applied to all listed securities in Pakistan, in Ready and Futures Markets, and was applicable for 109 calendar days, during trading sessions, *i.e*., the whole of a business day, it had immense effect on the trading volume at the Undertakings, so much so that the trading volume declined by more that 98 per cent. (See para 41 above). The decision, thus, restricted, reduced and prevented competition as follows:

i. It set the minimum price of the securities.
ii. The decision to set the price floor for securities had the effect of fixing "price element" and therefore the price, for the provision of brokerage services to buyers, sellers, investors, traders.
iii. It prevented competitive bidding – the very essence for which stock markets are established.
iv. It created a private market for the sale and purchase of listed securities. Submissions made by both KSE and LSE alluded to this fact. For example, KSE submitted, "it may be seen that trade also

continued unabated off-market pursuant to SECP directions and the floor did not hinder such activity all."[80] Similarly, LSE submitted, "[i]n fact, a large number of broker to broker sales did take place during the entire period that the 'floor' was in place."[81] Prior to the price floor decision, bids were made in public. Traders had the advantage of procuring competitive prices by trading in an open and transparent manner in terms of the system of an exchange. With the imposition of price-floor, the creation of private market disadvantaged the buyer and sellers, as they could not procure competitive prices.

v. The imposition of price-floor reduced the trading volumes by over 98 per cent, transforming the hustling and bustling stock exchanges to a standstill.

vi. It moved buyers and sellers away from a direct contact available in an exchange setting and forced them to trade privately thereby increased the "risks necessarily incident to a private market."[82] The decision, thus, created asymmetric information for buyers and sellers.

vii. It virtually entrapped investors who wanted to sell their securities at a price less than the prices fixed and could not find the buyers at or above the prices fixed by the decision of the Undertakings. Thus, it created a barrier to exit.

viii. The floor prevented investors from purchasing securities at market prices by imposing artificial minimum prices. This, in effect, created a barrier to entry.

ix. Imposition of the price floor severely restrained the choice of buyers and sellers as to the price at which they wish to conduct transactions.

[80] KSE Submissions, *supra* note 25, para 7.
[81] LSE Submissions, *supra* note 26, para 11.
[82] *Chicago*, *supra* note 73, at 240.

x. The decisions put a restraint on the right of alienation of security dealers, as they had no option to dispose of securities but on the floor of stock exchange.

xi. Imposition of the price floor altered the saving and investment behaviour of market agents and had unquantifiable adverse effects on the entire economy.

57. In light of Paragraphs 54 to 56, it is clear that the decisions of the Undertakings to place price floor, had the effect of preventing, restricting and reducing competition in the relevant market, and therefore violated Section 4(1).

*C. **Defenses Raised by KSE***

58. KSE and LSE raised the defense (see paragraphs 25(a) and 26 (j) respectively), that their act of placing the floor had the ***tacit approval*** of the securities regulator, *i.e.*, the Securities and Exchange Commission of Pakistan (SECP). In essence they argued for informal exemption from the application of the Competition Ordinance, and this type of defense is known as "state compulsion" defense in the E.U., "regulated conduct" defense in Canada, or "grant of implied immunity," in the United States. Under the Competition Ordinance, Section 52 empowers the Federal Government to (formally) exempt any class of undertaking from the application of the Ordinance or any provision thereof, and the Federal Government has not provided any exemption for stock exchanges from the application of the Ordinance.

59. On the other hand, Section 57 states that "the provision of this Ordinance shall have the effect notwithstanding anything to the contrary contained in any other law for the time being in force." However, it is quite possible that a subsequent legislation establishing a regulatory regime over an area of commercial activity may also have an overriding clause similar to Section 57. Would that mean that the Competition Ordinance will be displaced? The reply is in negative, for "the general sense of the phrase 'for the time being' is that of time indefinite, and

refers to indefinite state of facts which will arise in future and which may vary from time to time."[83] Thus, notwithstanding the overriding clause, a valid piece of legislation incompatible or repugnant to the provisions of the Competition Ordinance may be enacted. In such a situation, the Commission may ascertain how other jurisdictions have resolved the conflict between competition law and other regulatory laws. Here, the conflict resolution standards of "state compulsion" defense or "grant of implied immunity" adopted in the E.U. and U.S. respectively, are instructive and persuasive.

60. In the E.U., to plead the defense of state compulsion successfully, the party claiming the defense must satisfy the following three points:

i. That the state must have made certain conduct compulsory: mere persuasion is insufficient;
ii. That the defense is available only where there is a legal basis for this compulsion; and
iii. That there must be no latitude at all for individual choice as to the implementation of the governmental policy.[84]

61. The position in the United States is as follows:

> "[W]hen Congress by subsequent legislation establishes a regulatory regime over an area of commercial activity, the antitrust laws will not be displaced unless it appears that the antitrust and regulatory provisions are plainly repugnant"; and "[r]epeal is to be regarded as implied only if necessary to make the [regulatory act] work, and even then only to the minimum extent necessary." The Court has also professed an unwillingness to grant immunity "absent an unequivocally declared congressional purpose to do so."[85]

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[83] *Devkumarsinghji Kusturchandji* v *State of Madhya Pradesh and others*, AIR 1967 MP 268 at para 11 citing *Ellison* v. *Thomas*, (1862) 31 LJ Ch 867.
[84] Whish, *supra* note 38 at p. 129.
[85] Parker C. Folse, III, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 Tex. L. Rev. 751 at 767 (1979) citing: *City of Lafayette v. Louisiana Power & Light Co*., 435 U.S. 389, 398 (1978); *Gordon v. New York Stock Exch*., 422 U.S. 659, 682 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963); *Silver v. New York Stock Exch*., 373 U.S. 341, 357 (1963). *See Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 305 (1963).

62. The standard for repealing antitrust laws by implication, in the U.S., is "clear incompatibility"[86] or "plain repugnancy between the antitrust and regulatory provisions."[87] In order to ascertain sufficient incompatibility to warrant an implication of preclusion, the Courts have frequently employed the following four point test:

i. the existence of regulatory authority under the securities law to supervise the activities in question;
ii. evidence that the responsible regulatory entities exercise that authority;
iii. a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct; and
iv. the possible conflict affected practices that lie squarely within an area of financial market activity that securities law seeks to regulate.[88]

63. In the instant case, employing the E.U. state compulsion test, the SECP had not made the price floor compulsory. Both KSE and LSE themselves claim that they had the "tacit" approval of the SECP, which is not enough to let KSE and LSE avail the defense. The tacit approval, as claimed by KSE and LSE, would not pass the test as employed by the Courts in the U.S. either. In this case, there is existence of a regulatory authority (*i.e.*, SECP), which did exercise its authority by placing circuit breakers. The fact that the Undertakings have set

[86] *Credit Suisse Securities v. Glen Billing et al.*, 127 S.Ct. 2383 (2007).
[87] *Gordon v. New York Stock Exchange, Inc*., 422 U.S. 659 at 682 (1975); citing the following cases: *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351, 83 S.Ct. 1715, 1734-1735, 10 L.Ed.2d 915 (1963). *See also Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S., at 126, 94 S.Ct., at 389; *Hughes Tool Co. v. Trans World Airlines, Inc*., 409 U.S. 363, 385-389, 93 S.Ct. 647, 659-662, 34 L.Ed.2d 577 (1973); *Carnation Co. v. Pacific Conference*, 383 U.S. 213, 217-218, 86 S.Ct. 781, 784-785, 15 L.Ed.2d 709 (1966); *Silver v. New York Stock Exchange*, 373 U.S., at 357-358, 83 S.Ct. at 1257-1258;*United States v. Borden Co*., 308 U.S. 188, 198-199, 60 S.Ct. 182, 188-189, 84 L.Ed. 181 (1939); *United States v. National Assn. of Securities Dealers*, 422 U.S. 694, at 719-720, 729-730, 95 S.Ct. 2427, 2443, 2447-2448, 45 L.Ed.2d 486
[88] *Credit Suisse Securities v. Glen Billing et al.*, 127 S.Ct. 2383 (2007). Citing *Gordon v. New York Stock Exchange, Inc*., 422 U.S. 659 (1975); *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975).

the floor while the circuit breakers were in place at the behest of SECP may tantamount to usurping the powers of the SECP. If the conduct in question is not regulated by the regulatory authority, as in the present case, the need to assess resulting risks and possible conflict (points iii & iv) become redundant. Thus, the tacit approval of the SECP is not sufficient to show that the Undertakings were acting under conflicting regulatory commands.

64. KSE argued (see para 25 (d) above) that the floor was placed pursuant to its Regulations Governing Risk Management promulgated in exercise of powers conferred by section 34 of the Securities and Exchange Commission Ordinance, 1969 with the prior approval of the SECP; and that the decision to place the floor was a decision taken by the Karachi Stock Exchange as a frontline regulator and not as a business. In this particular situation, the application of Section 57 of the Ordinance is obviously quite apt, and the argument, therefore, fails. This argument would even fail to meet the "implied immunity" standard, as the "regulatory responsibility sufficient to trigger immunity when in the hands of an administrative agency may not be sufficient when conferred on an industry organ as a self-regulatory regime."[89]

65. Further, KSE argued the instant proceedings were initiated without fulfilling the prerequisites in Section 37 of the Ordinance. First to conduct inquiry by the Commission (not any person/body) and thereafter to determine whether the proceedings under Section will be in the public interest (See para 25 (c) above). As to the argument that only the Commission and not any person/body should conduct the inquiry, I have to say that I am a little disappointed with lawyers who present their arguments based on a selective reading of the Ordinance. Section 28(2) of the Ordinance authorizes the Commission to "delegate all or any of its functions and powers to any of its Members or officers as it deems fit." The Commission had delegated the powers to initiate

[89] Lawrence A. Sullivan & Warren S. Grimes, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK, 2nd edition Thomson, West 2006 at p. 790.

inquiries under Section 37 to the Members and had been notified in the Official Gazette (see SRO. 999(I)/2008 dated 19th September, 2008). As to determination of public interest, the Inquiry Report at paragraph 24 mentioned that "setting a floor on the price of securities on the part of the Undertakings, has significantly impacted confidence of investors." When attention of the counsel for KSE was drawn to paragraph 24, he conceded that "confidence of investors" is a matter of public interest.

66. The argument as to the determination of public interest, however, raises a question, that is, what is meant by "public interest" as used in Section 37. Section 37 in relevant part is reproduced below:

> 37 (4) If upon the conclusion of an inquiry under sub-section (1) or subsection (2), the Commission is of the opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under section 30.

67. Ensuring competitive markets is in the public interest.[90] On the other hand, ensuring provision of "clean air" to the public is also in the public interest. Consider for example that a giant multinational enterprise ('MNE") installed a technologically advanced brick making factory which produces zero emissions in the air, thus contributing to environment by not polluting it. However, under the guise to ensure cleaner air, the MNE decides to engage in predatory pricing so as to push all traditional brick kilns, which emit a lot of smoke in the air and thus pollute the environment and reduce the quality of air available to public, out of business. The practice of predatory pricing while reducing competition will also result in ensuring clean air to the public. Should the Commission not initiate any proceedings against the MNE since the practice of

[90] *See, e.g.*, Areeda & Hovenkamp, *supra* note 37 at p. 7-103 (the existence of a tort remedy does not necessarily obviate antitrust concern, *for the public interest in competition* is not necessarily vindicated by private tort remedies); *FCC v. RCA*, 346 U.S. 86, 94, 73 S.Ct. 998, 1004 (1953) ("there can be no doubt that competition is a relevant factor in weighing the public interest.");*Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 at 692 (1975).(The antitrust laws are designed to safeguard a strong public interest in free and open competition, and immunity from those laws should properly be implied only when some equivalent mechanism is functioning to protect that public interest.)

predatory pricing was promoting a certain "public interest"? I would reply in the negative.[91] It is an established rule of statutory interpretation that "where a word is used in an Act which is capable of various shades of meaning, the particular meaning to be attached must be arrived at by reference to the scheme of the Act."[92] Lord Cave, in *Brown v. National Provident Institution* held:

> [I]n choosing between two competing constructions, each of them possible, it is not irrelevant to consider that one of them is consistent with the obvious purpose of the Act, while the other would render the statute capricious or abortive.[93]

The words "public interest" when read with the obvious purpose of the Competition Ordinance would mean nothing else but ensuring competitive markets. And the "confidence of investors" is an essential element in ensuring competitiveness of stock exchanges. The SECP has also taken the same view. In its Directive, SMD/SE/2(20) 2008, dated 11th December 2008, the SECP noted that "it is in the public interest to allow the securities markets to function without any hindrance in order to maintain the confidence of the investors." The Directive is reproduced at paragraph 24 above.

68. KSE further argued that the circumstances surrounding the KSE's decision to place a floor on 27th August 2008 were indeed emergent, exceptional and all but drastic and such decision made by the KSE board was in the public interest. (See para 25 (e) above). However, the SECP held a different view. In its Directive instructing the Undertaking to lift the floor, SECP noted that "the continuing restriction on the trade prices of securities had adversely affected the ability of market participants to manage their respective investments" and the public interest demands that "the securities markets to function without any

[91] Indeed, an environmental protection agency may order the brick kilns to shut down for environmental or any other related concern. *See, for example,* The NEWS, *Closure of 12 Brick Kilns Ordered,* 19 March 2009, available at http://www.thenews.com.pk/daily_detail.asp?id=167801
(The Ministry of Environment has directed 12 brick kilns located in the vicinity of Benazir Bhutto International Airport, Islamabad, to stop their operation within one month to overcome visibility problems for aeroplanes as well as improving air quality in the area).

[92] M N Rao & Amita Dhanda (editors), N S BHINDRA'S INTERPRETATION OF STATUTES (LexisNexis Butterworths 10th Ed. 2007) at p. 798 citing *Nihal Singh v Sri Ram* AIR 1939 Lah 388; *Manohar Lal v. Emperor* AIR 1943 Lah 1; *Hazara Singh v State of Punjab* AIR 1961 Punj 34, p. 39 (FB).

[93] *Id*. at p. 799. [1921] 2 AC 222, p. 241.

hindrance in order to maintain the confidence of the investors."[94] For further comment on KSE's argument regarding public interest, see paragraphs 65 to 67, above.

69. KSE's arguments listed at paragraph 25 (f), (g) (h) and (i), above are addressed in section II. B. titled *Application of Section 4*, starting at page 18, above. With regard to the argument that the price floor was not the result of an arrangement and or agreement among KSE, LSE and ISE, suffice it to say that the KSE has misread the Inquiry Report. Nowhere in the Report was it alleged that the placing of price floor was a result of an agreement or arrangement among KSE, LSE and ISE.

70. Finally, KSE argued that Article IV (4)(d) of the Memorandum of Association of KSE authorizes it to make or adopt regulations relating to "fixing and declaring market rates and settlement rates and dates." (see paragraph 25 (j), above). Suffice it to say that Article IV(4)(d) of the Memorandum of Association of KSE, being clearly repugnant to section 4 of the Competition Ordinance cannot save the decision of the KSE.

D. ***Defenses Raised by LSE***

71. Arguments raised by LSE at paragraph 26 (e) and (i) are addressed in section II. B. titled *Application of Section 4*, starting at page 18, above. The argument listed at paragraph 26 (j) is already addressed at paragraphs 58 to 63, above.

72. LSE argued that it placed the floor to prevent panic selling through its platform. Had LSE not imposed the price floor, the resultant exaggerated price fall would have created the danger of large scale default by the members of the LSE, which would have resulted in the erosion of the security value of the members of the KSE. (See paragraph 26 (f) and (g)). While placing of the floor by LSE with a view to protect the security value of its members and that of the

[94] SECP Directive reproduced at paragraph 24 above.

KSE members, perhaps may have been well-intentioned, but it certainly had the effect of preventing, restricting, and reducing competition in the relevant market. See paragraphs 54 to 57 above, for further discussion on this point.

73. LSE further argued that its actions amounted to a mere suspension of a service for securities trading below a certain level. (see paragraph 26 (h)). Benign as it were portrayed, the decision of LSE was no different from a decision of an association of architects, accountants, lawyers or doctors who refuse to provide their service "below a certain level" of fee.[95] See paragraphs 46 to 57 above, for further discussion on this point.

E. ***Defenses Raised by ISE***

74. Submissions made by ISE at paragraph 28 are addressed in section II. B. titled Application of Section 4, starting at page 18, above.

III. Penalties

75. Ordinarily, in view of the seriousness of the violation, high penalties would be appropriate. However, competition regime is rather new in Pakistan, and it is understandable that the market players need some time to align their activities/business practices to conform with the dictates of the Competition Ordinance. Keeping this aspect in mind, I am inclined to err on the lower side rather than the higher side while imposing penalties for this violation of Section 4(1). Also, I need to bear in mind that while ISE had been rather contrite, both KSE and LSE were not. Further, the actions of KSE and LSE had

[95] *See, e.g., Goldfarb v. Virginia State Bar* , 421 U.S. 773, 95 S.Ct. 2004 (1975) (Lawyers were party to a price-fixing decision); *Arizona v. Maricopa Cy. Medical Soc'y*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) (doctors were parties to price fixing agreement); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (Engineers were party to a price fixing agreement); *Northern Cal. Pharmaceutical Ass'n v. United States*, 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862, 83 S.Ct. 119, 9 L.Ed.2d 99 (1962) (pharmacists); *Mardirosian v. American Inst. of Architects*, 474 F.Supp. 628 (D.C.C.1979) (architects subject to antitrust laws); *United States Dental Inst. v. American Ass'n of Orthodontists*, 396 F.Supp. 565 (N.D.Ill.1975) (dentists and orthodontist); Commission Decision of 24 June 2004 relating to a proceeding under Article 81 of the EC Treaty (In the matter of Belgian Architects' Association).

broad consequences on the economy; whereas consequences of ISE's actions were somewhat *de minimis.* The parties are, therefore, penalized as follows:

i. KSE for a sum of rupees six million (Rs. 6,000,000).
ii. LSE for a sum of rupees one million (Rs. 1,000,000);
iii. ISE for a sum of rupees two hundred thousand (Rs. 200,000).

The Undertakings shall pay the penalty imposed within thirty days of the date of this Order, failing which recovery proceedings shall be initiated under Section 40 of the Ordinance.

76. It is so ordered.

(DR. JOSEPH WILSON)
Member

ISLAMABAD, THE 18TH OF MARCH, 2009.